

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NICK MAKREAS,

Plaintiff,

v.

THE MOORE LAW GROUP, A.P.C., et al.,

Defendants.

No. C-11-2406 MMC

**ORDER DIRECTING DEFENDANT
MOORE LAW GROUP AND PLAINTIFF
MAKREAS TO FILE SUPPLEMENTAL
BRIEFING; CONTINUING HEARING ON
MOTIONS TO DISMISS**

Before the Court are two motions to dismiss, filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure: (1) defendant The Moore Law Group, A.P.C.'s ("TMLG") motion to dismiss, filed November 21, 2011; and (2) defendant Citibank (South Dakota), N.A.'s ("Citibank") motion to dismiss, filed November 14, 2011. Plaintiff Nick Makreas ("Makreas"), who proceeds pro se, has filed opposition to each motion, and each defendant has filed a reply. Additionally, Makreas has filed a "reply" to TMLG's reply.¹ Having read and considered the papers filed in support of and in opposition to the motions, the Court finds supplemental briefing is necessary to resolve the motion filed by TMLG.

As noted, TMLG, by its motion, seeks dismissal pursuant to Rule 12(b)(6). In the

¹The Civil Local Rules of this District provide that, with two exceptions not applicable here, "[o]nce a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval." See Civil L.R. 7-3(d). Makreas did not obtain leave of court prior to filing his "reply." Nonetheless, the Court has considered the filing.

1 last two pages of its reply, however, TMLG additionally requests dismissal based on lack of
2 subject matter jurisdiction. In support thereof, TMLG asserts it “issued two separate FRCP
3 68 Offers of Settlement to [Makreas],” the first of which “offered [Makreas] settlement for
4 the maximum statutory damages that he could possible recover from this present case and
5 litigation against TMLG,” but that “[Makreas] has chosen to reject this offer and continue
6 with litigating his claims.” (See TMLG’s Reply at 14:19-26 (citing cases holding that where
7 a defendant makes an offer to have judgment entered against it for the full amount of
8 damages sought by the plaintiff, and the plaintiff rejects the offer, the plaintiff’s case is
9 subject to dismissal for the reason that no case or controversy remains)); see, e.g.,
10 Zimmerman v. Bell, 800 F.2d 386, 388, 390 (4th Cir. 1986) (affirming dismissal of claim,
11 where plaintiff rejected offer of judgment in “maximum amount of damages claimed by
12 [plaintiff]” plus costs; holding, based on such offer, “there was no longer any case or
13 controversy”).

14 In considering a motion to dismiss pursuant to 12(b)(6), a district court is limited to
15 the face of the complaint, attachments thereto, and documents subject to judicial notice.
16 See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir.
17 1990); Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986). A
18 party seeking dismissal for lack of subject matter jurisdiction, however, may support the
19 motion with evidence. See Thornhill Publishing Co. v. General Tel. & Electronics Corp.,
20 594 F.2d 730, 733 (9th Cir. 1979) (“A motion to dismiss for lack of subject matter
21 jurisdiction . . . may be made as a ‘speaking motion’ attacking the existence of subject
22 matter jurisdiction in fact.”). Here, however, TMLG offers no evidence to support the
23 assertions made in its reply. Further, in his “reply,” Makreas asserts he “did accept
24 [TMLG’s] financial Offer of Settlement,” but that TMLG subsequently reneged on the offer
25 when it presented him with a “settlement agreement” containing an additional term (see
26 Pl.’s “Reply” at 2:9-13); Makreas likewise offers no evidence to support his factual
27 assertions.

28 //

1 Before reaching the merits of a motion to dismiss for failure to state a claim, the
2 Court must determine whether it has subject matter jurisdiction. See Steel Co. v. Citizens
3 For A Better Environment, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot
4 proceed at all in any cause.") On the record presented, however, the Court is unable to
5 determine whether it has jurisdiction over Makreas's claims against TMLG.

6 Accordingly, the Court hereby sets the following supplemental briefing schedule and
7 continues the hearing on both motions to dismiss, as follows:

8 1. No later than January 6, 2012, TMLG shall file a declaration or declarations
9 setting forth the terms of the offer or offers made, and shall attach as exhibits any written
10 documentation of the offer(s) and response(s) thereto.

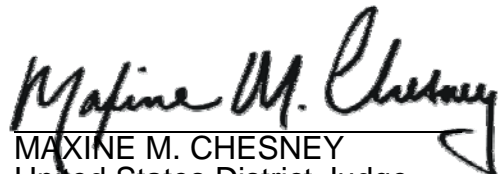
11 2. No later than January 20, 2012, Makreas shall file any responsive declaration or
12 declarations, and shall attach any additional documentation regarding the offer(s) and
13 response(s) thereto.

14 3. The hearing on TMLG's motion to dismiss is hereby CONTINUED from January
15 6, 2012 to February 3, 2012, at 9:00 a.m.

16 4. In the interest of judicial economy, the hearing on Citibank's motion to dismiss is
17 hereby CONTINUED from January 6, 2012 to February 3, 2012, at 9:00 a.m.

18 **IT IS SO ORDERED.**

19
20 Dated: December 23, 2011

21 
22 MAXINE M. CHESNEY
23 United States District Judge
24
25
26
27
28